IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 27, 2007

STATE OF TENNESSEE v. JAMES T. BARHAM

Direct Appeal from the Criminal Court for Sullivan County
No. S46,234 Phyllis H. Miller, Judge

No. E2006-00571-CCA-R3-CD - Filed July 31, 2007

The defendant, James T. Barham, pled guilty to simple possession of cocaine, possession of a prohibited weapon, and possession of drug paraphernalia, all Class A misdemeanors, in exchange for three concurrent sentences of eleven months, twenty-nine days with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court ordered that the defendant serve the effective eleven month, twenty-nine day sentence on supervised probation conditioned upon him serving fifty-eight days in the county jail. On appeal, the defendant argues that the trial court erred in not granting him full probation. Upon our review of the record and the parties' briefs, we affirm the sentencing decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Richard Tate, Assistant Public Defender, Blountville, Tennessee, for the appellant, James T. Barham.

Robert E. Cooper, Jr., Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; H. Greeley Welles, Jr., District Attorney General; and Kent Chitwood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The Sullivan County Grand Jury issued a presentment on May 14, 2002, charging the defendant with possession of less than .5 grams of cocaine for resale, possession of a prohibited weapon, possession of drug paraphernalia, and possession of a Schedule III controlled substance for

resale. On December 7, 2005,[1] the defendant pled guilty to simple possession of cocaine, possession of a prohibited weapon, and possession of drug paraphernalia, all Class A misdemeanors, and the possession of a Schedule III controlled substance charge was dismissed. The underlying facts of the cases, stipulated to by the parties at the guilty plea hearing, are as follows:

> [I]n S46,234 . . . on July 30th, 2001[,] a drug transaction was arranged between an informant and the defendant. The informant placed a call, according to the defendant's statement and the State's proof, the informant placed a call to him, it was arranged that they would meet. He states that he had small amounts of powder. The State would introduce proof that that is explained [sic] for cocaine. The State's proof would be that he met with [the informant] in the vehicle, he produced a bag which she observed to be what she believed cocaine and that he poured some out on a organizer, started cutting it up with his driver's license. At that point the transaction was being monitored by Kingsport vice officers. They felt that she was in a compromised position and may be forced to use a controlled substance. They tried to extract her from the car by approaching the car and knocking on the window. When they did that[,] the defendant, according to [the informant's] testimony and the observation of Officer Chambers with the Kingsport Police Department, he flipped the organizer over spilling the cocaine throughout the car, dropped the organizer between the seat and at that point they got him to exit the vehicle. The organizer was retrieved, sent to the Tennessee Bureau of Investigation, analyzed and a trace amount of cocaine was found on the organizer itself. Also the officers found a slapjack in the driver's side door of the car. . . . [I]t would be the testimony of the officer that it could cause serious bodily injury and that there was no lawful purpose for owning the slapjack. The State's proof would also be they found a cut off piece of a straw in the driver's side door which is used to ingest cocaine . . . .

The defendant received concurrent terms of eleven months, twenty-nine days on each of his three convictions with the manner of service to be determined by the trial court following a sentencing hearing. On the February 15, 2006, sentencing hearing, the defendant testified that he lived in Sevier County and was employed with the Blue Green Corporation in a time-share sales position. He graduated high school in 1982 and has had a steady employment record since that time. The defendant said that he had three children between his two ex-wives, and he was current on his child support even though he had been "cited" in 1992 for failure to pay child support. The defendant stated that he attended two years of college and had a real estate affiliate broker license. The defendant testified that he had already paid the administrative fees ordered by the court and said that he would abide by whatever conditions the court imposed if granted alternative sentencing. The defendant said that if he took a drug test that day, the result would be negative. The defendant recalled that he had not missed a court appearance in this case and had done whatever the court asked of him. The defendant acknowledged that in 2001 he was charged with harassment and vandalism

[1] The reason for the long delay between the date of the offense and plea hearing is not clear from the record. However, it appears that a hearing on a motion to suppress was conducted in the interim.

arising out of an incident with his ex-wife Jennifer, but he explained that "[i]t was a rough period of time for [him]." The defendant also acknowledged that there was an allegation that he had written a bad check in 1990, and he said that he had tried to find the check and would take care of it if he knew to whom it was written.

On cross-examination, the defendant testified that he gave the presentence officer a statement about what happened in this case even though the report said that the defendant "chose not to give a statement[.]" However, the defendant later said that he would not dispute what was in the report because he did not remember being asked to give a statement even though he "would have gladly told her about it." The defendant recalled a hearing in April 2003 in which Brian Ketron[2] testified that the defendant had assisted him in obtaining controlled substances off the internet, and in exchange for his help, he gave the defendant some of the substances. However, the defendant claimed that he never received any substances from Mr. Ketron. The defendant testified that he showed other people how to "legally" get controlled substances off the internet, although he "guess[ed]" he knew it was not legal for him to take some of the substances. The defendant admitted that at the time of his arrest, he had a number of drivers' licenses or copies thereof in his possession. The defendant also admitted that he had a fax machine that he used for the purpose of purchasing drugs for other people. The defendant stated that in 2005 he had an income of $80,000 and anticipated the same income for the present year.

In regard to the offenses in this case, the defendant admitted that he had a little bit of cocaine when he met with Ms. Lane, the confidential informant, and it was his intent to share it with Ms. Lane. However, the defendant said he did not ask Ms. Lane for money. The defendant recalled that he was "terrified" when the police officers approached the car and acknowledged that he did not agree to get out of the car until the officers flattened the car tires. The defendant stated that he had previously used cocaine with Ms. Lane, and they had a romantic relationship at some point in the past. On redirect-examination, the defendant recalled that he talked about the offenses with the presentence officer, but he was not asked to make a written statement.

When asked by the court how he tried to find the bad check, the defendant said that he called Check Recovery Systems and they had no record of the check. On further examination by the court, the defendant admitted that he did not go to the general sessions court and inquire about the bad check case. The court then questioned the defendant about inconsistencies in his work history, specifically with his omission of his employment at Bachman Rule Honda, and inconsistencies regarding who paid his bond. Still under examination by the court, the defendant acknowledged that he had a violation of probation filed on October 15, 2001, and it was still outstanding. The defendant admitted that he was held in contempt of court in August 1992 for failing to pay child support, and his child support payments were now being garnished from his paycheck. In revisiting the events of this case, the defendant explained that he met with Ms. Lane because she was going to spend the night with him, and the small amount of cocaine found in his car was leftover from the previous night.

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[2] It is not clear who Mr. Ketron is from the record.

On recross-examination, the defendant stated that he must have forgotten to tell the presentence officer about his employment at Bachman Rule Honda, and he admitted that he had been terminated from that job. The defendant said that Ms. Lane had also worked at Bachman Rule and it was his understanding that she was also terminated. In again revisiting the events of this case, the defendant testified that Ms. Lane was trying to get an Oxycontin pill from him, not cocaine.

Linda Burrow, the defendant's presentence report officer, testified that she met with the defendant on December 14, 2005. Regarding whether the defendant provided a statement, Ms. Burrow explained that the defendant was given a questionnaire and when he returned it on his interview date, the portion asking the defendant to "[t]ell in your own words the circumstances of your offense, why you committed the offense, [and] your present feelings about your situation" was left blank. Ms. Burrow further testified that in such situations, she always asks defendants if they want to give a statement and tells them they can mail one to her later. She said that she never received a mailed statement from the defendant. Ms. Burrow stated that she and the defendant talked about his case "but not in any detail."

In sentencing the defendant, the court stated that the defendant's educational history was good, his work history was not excellent given that he had been fired from a job, he had an outstanding probation violation warrant, had been in contempt of court for failing to pay child support, and had illegally used drugs in the past. The court noted that the defendant had prior criminal convictions, a fair social history, and made "really good money." The court questioned why the defendant had filed an affidavit of indigency given his income. The court further determined that the defendant's testimony was not credible, particularly in his assertion that Ms. Lane was trying to get one Oxycontin pill from him, not cocaine. The court sentenced the defendant to supervised probation for eleven months, twenty-nine days provided that he meet the following conditions: that he spend from February 15th through April 14th – 58 days – in the county jail, have a negative drug screen, pay $2,000 to partially reimburse the state for his attorney, not receive any prescriptions through the mail, and have no contact with Ms. Lane. The defendant then asked for an appeal bond, and the trial court subsequently addressed on the record the enhancement and mitigating factors that were found and not found.

ANALYSIS

On appeal, the defendant argues that the trial court erred in denying him full probation by requiring that he serve fifty-eight days in the county jail as a condition of his probation. Specifically, the defendant argues that none of the circumstances set out in Tennessee Code Annotated section 40-35-103 apply to him, and that the trial court did not consider enhancement and mitigating factors until he indicated he would appeal his sentence. The defendant does not contest any of the other conditions of probation ordered by the trial court.

This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This

presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

Misdemeanor sentencing is controlled by Tennessee Code Annotated § 40-35-302, which provides, in part, that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). As also provided under this section, the trial court must set a release eligibility percentage not greater than seventy-five percent, or alternatively, "grant probation immediately or after a period of split or continuous confinement." *Id.*; *see also* Tenn. Code Ann. § 40-35-302(d), (e). More flexibility is extended in misdemeanor sentencing than in felony sentencing. *State v. Troutman*, 979 S.W.2d 271, 273 (Tenn. 1998).

The defendant has the burden of establishing his suitability for full probation. *See* Tenn. Code Ann. § 40-35-303(b). To meet this burden, the defendant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000) (internal quotation omitted). In determining whether to grant or deny probation, the trial court should consider: the circumstances of the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, the best interest of the defendant and the public, and the defendant's credibility as it reflects on a defendant's potential for rehabilitation. *See State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997). Sentences involving confinement should be based upon the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;

Tenn. Code Ann. § 40-35-103(1). Additionally, the defendant's potential or lack of potential for rehabilitation or treatment should be considered in determining the sentence alternative or length of a term to be imposed. *Id.* § 40-35-103(5).

Regarding the defendant's first contention that none of the principles set out in Tennessee Code Annotated section 40-35-103 apply to him, we conclude that the record indicates otherwise. The record reflects that measures less restrictive than confinement had recently been applied unsuccessfully to the defendant. *See* Tenn. Code Ann. § 40-35-103(1)(C). The presentence report shows that the defendant was convicted of harassment and vandalism on June 14, 2001, and he received consecutive sentences of eleven months, twenty-nine days with both sentences being probated in full. The defendant committed the offenses in the present case on July 30, 2001, while clearly still on probation from the earlier offenses. A probation violation was thereafter filed on October 15, 2001.

The record also reflects a lack of candor on the defendant's part, which is probative of his potential for rehabilitation. *See State v. Souder*, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002); *see also* Tenn. Code Ann. § 40-35-103(5). At the hearing, when asked if he had worked the entire time since graduating high school, the defendant replied, "Absolutely, yes, sir." However, the defendant later admitted that he had worked at Bachman Rule Honda from sometime in 2001 until February 2002 and had been fired from that job along with the confidential informant in this case. The defendant said that he had "forgot" to tell this fact to his presentence report officer. The defendant also admitted that he was unemployed for an approximate nine-month period in 2002, yet he did not report this fact to the presentence report officer. In addition, the trial court heard the testimony at the hearing and found the defendant's testimony not credible. We conclude that the trial court addressed the relevant considerations in sentencing the defendant and had sufficient justification for requiring that he serve a nominal period in confinement. Moreover, it was the defendant's burden to prove his suitability for full probation, and the defendant provided the trial court with no evidence or reasons upon which a fully probated sentence could be based.

Regarding the defendant's second contention, that the trial court did not consider enhancement and mitigating factors until after the sentence was imposed, we note that the defendant can only speculate that the trial court did not consider the factors because the court was not required, as in felony sentencing, to place its findings on the record. *See Troutman*, 979 S.W.2d at 274. Moreover, the trial court did make formal findings on the record after the defendant indicated he planned to appeal, presumably to facilitate appellate review. In any event, a de novo review of the record clearly shows that the defendant had prior criminal convictions and failed to comply with sentences involving release in the community because he was on probation when he committed the offenses in this case and had an outstanding violation of probation. *See* Tenn. Code Ann. § 40-35-114(1), (8). Accordingly, we affirm the judgment of the trial court sentencing the defendant to supervised probation conditioned upon him serving fifty-eight days in the county jail.

CONCLUSION

Based on the above mentioned authorities and reasoning, we affirm the sentencing decision of the Sullivan County Criminal Court.

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J.C. McLIN, JUDGE